IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANDRE ROYAL,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL *et al.*,

Defendants.

Case No. 19-cv-5164 (AJN)

MEMORANDUM IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiff is a former professional football player currently receiving disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan"), a benefit plan for retired National Football League ("NFL") players negotiated between Defendant NFL Management Council (the "NFLMC"), the representative of the NFL clubs, and the NFL Players' Association ("NFLPA"), the NFL players' union. Although Plaintiff is receiving benefits at the exact benefit that he applied for from the Plan, he now brings this case based on his allegation that he could have received a higher level of benefits if the Retirement Board responsible for administering the Plan had provided him with the Plan and a summary plan description defining the standard for players seeking to reclassify their level of benefits.

In fact, Plaintiff's complaint is nothing more than a near carbon copy of another former player's complaint filed in this District in 2018. (*See* Am. Compl., ECF No. 15, ¶¶ 2, 3, 6-9.) *See Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 18-cv-4483 (GHW) (RWL) (S.D.N.Y.). The complaint in *Hudson* that Plaintiff appears to have copied (down to the typos) was dismissed on September 30, 2019 after District Judge Woods agreed with Magistrate Judge Lehrburger that the claims leveled against the NFLMC "predicated on its purported fiduciary liability . . . are without merit and should be dismissed." *Hudson* Report & Recommendation ("*Hudson* R&R") at 36, No. 18-cv-4483, ECF No. 90. As was the case in *Hudson*, Plaintiff's complaint fails on multiple levels and must be dismissed. *See Hudson* Order Adopting Report & Recommendation ("*Hudson* Order") at 2, No. 18-cv-4483, ECF No. 96.[1]

[1] We attach copies of Judge Lehrburger's Report & Recommendation in the *Hudson* case ("*Hudson* R&R"), as well as Judge Woods's Order adopting the Report & Recommendation ("*Hudson* Order"), as Exhibits B and C respectively, to the Declaration of Stacey R. Eisenstein ("Eisenstein Decl."), which has been filed together with this memorandum of law.

With respect to the NFLMC specifically, Plaintiff's claims that the NFLMC failed to monitor the actions of the Retirement Board are based on the faulty premise that the NFLMC is a "fiduciary" to the Plan, and, in any event, do not demonstrate that the NFLMC breached any purported fiduciary duty. Accordingly, Defendant NFLMC respectfully requests the Court to dismiss Counts III, IV, and V of Plaintiff's Complaint as to the NFLMC for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

The Bert Bell/Pete Rozelle NFL Player Retirement Plan

The Plan in this case is a Taft-Hartley multi-employer pension plan, which is the result of a collective bargaining agreement between the NFLMC, on behalf of the 32 member clubs of the NFL who contribute to the Plan, and the NFLPA, on behalf of the players. (Am. Compl., ¶¶ 19, 20; *see also* the Plan, page 1.)[2] In accordance with the Taft-Hartley Act, 29 U.S.C. §§ 141-197, the Plan is administered by the Retirement Board, which comprises three voting members appointed by the NFLMC (the employer representatives) and three voting members appointed by the NFLPA (the union representatives). (Plan, Art. 8.1, 8.2.) The NFLMC and the NFLPA have

[2] Given the central importance of the Plan itself and the fact that Plaintiff has referred to it repeatedly throughout his Complaint, we have attached the 2009 Plan to the declaration accompanying this memorandum of law. *See Cent. States, Se. & Sw. Area Health, & Welfare Fund v. Gerber Life Ins. Co.*, 984 F. Supp. 2d 246, 249 (S.D.N.Y. 2013) ("Specifically in the ERISA context, '[b]ecause the Plan is directly referenced in the complaint and is the basis of this action, the Court may consider the Plan in deciding the motion to dismiss.'") (internal citations omitted). The Plan has undergone multiple amendments and restatements during the relevant time period, but Plaintiff alleges that the 2009 Plan governs his disability benefits. (*See* Am. Compl. ¶ 30.) Accordingly, we attach a copy of the Plan Amended and Restated as of April 1, 2009 as Exhibit D to the Eisenstein Decl. Curiously, Plaintiff claims that he has never received a copy of the 2009 Plan (*see id.* ¶ 30), however, the 2009 Plan is quoted extensively throughout the Amended Complaint.

the authority to remove and appoint a replacement for any member of the Retirement Board that each has respectively appointed. (*Id.*, Art. 8.1.)

Pursuant to the terms of the Plan, the Retirement Board is the "named fiduciary" of the Plan within the meaning of ERISA, and has the "full and absolute discretion, authority and power to interpret, control, implement, and manage the Plan . . . ." (*Id.*, Art. 8.2.) The Retirement Board's authority includes the power to, *inter alia*, define and construe the terms of the Plan, decide claims for benefits, and adopt procedures and rules for the administration of the Plan. (*Id.*, Art. 8.2.) The Plan does not authorize the NFLMC or the NFLPA to supervise or direct the decisions of the members that they appoint to the Retirement Board in the Retirement Board's administration of the Plan.

The Plan provides total and permanent ("T&P") disability benefits to eligible players. (Am. Compl. ¶ 29.) The Plan provides T&P benefits in four different classifications, although only two are relevant in this case. "Active Football" benefits are available "if the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disable 'shortly after' the disability(ies) arises." (Plan, Art. 5.1(a).) "Football Degenerative" benefits are available if "the disability(ies) arises out of League football activities, and results in total and permanent disability before fifteen years after the end of the Player's last Credit Season". (*Id.*, Art 5.1(c).) Players receive a higher level of benefits under the "Active Football" benefits classification. (Am. Compl. ¶ 73.)

As provided by the Plan, the Disability Initial Claims Committee decides initial claims for disability benefits under the Plan, and consists of three members: one appointed by the NFLPA, one appointed by the NFLMC, and one medical professional jointly designated by the NFLPA and the NFLMC. (Plan Art. 8.2(b); 8.4.) The classification of disability benefits is determined by the

appropriate entity (either the Disability Initial Claims Committee or the Retirement Board), who reviews the facts and circumstances in the administrative record. (Am. Compl. ¶ 36.) Once his disability benefits are classified, a player can petition to be reclassified to receive a higher level of benefit. (*Id.* ¶ 37.) The player must show the Retirement Board or the Disability Initial Claims Committee "clear and convincing" evidence that because of "changed circumstances," the player satisfies the conditions of eligibility for a new classification of disability benefits. (*Id.*)

Procedural Background

Plaintiff is a former NFL football player, who currently receives T&P disability benefits under the Plan. (Am. Compl. ¶ 10.) Plaintiff filed an initial application for disability under the Plan in October 2000, checking a box for "Football Degenerative" benefits on the application form. (*Id.* ¶¶ 41, 43.) After reviewing his claims, the Retirement Board determined that Plaintiff met the requirements for Football Degenerative benefits, and at an October 18, 2001 meeting, the Retirement Board granted his request for T&P benefits. (*Id.* ¶ 44.)

Plaintiff sought reclassification of his T&P benefits in May 2015, from Football Degenerative benefits to Active Football benefits, not because of changed circumstances, but arguing that the Retirement Board incorrectly classified his T&P benefits in 2001 despite the fact that the Retirement Board had awarded him the benefit level *he requested*. (*Id.* ¶¶ 47, 49.) The Retirement Board denied reclassification of Plaintiff's T&P benefits in December 2015. (*Id.* ¶ 50.)

Plaintiff's Claims

The gravamen of Plaintiff's Complaint is that the Retirement Board violated ERISA and its fiduciary duties by failing to provide Plaintiff with Plan documents, and by failing to explain—in the documents that Plaintiff claims were never provided to him—what constituted "clear and convincing evidence" or "changed circumstances" sufficient to qualify for the higher benefit level.

(*Id.* ¶¶ 40-62.) As the Plaintiff admits, however, there were no "changed circumstances," under any definition of that phrase, other than the Plaintiff learning shortly before May 14, 2015 that the Plan provided a higher level of benefits than Football Degenerative. (*Id.* ¶¶ 47).

Plaintiff also asserts three claims against the NFLMC, all contingent upon the NFLMC being a fiduciary to the Plan and having breached its fiduciary duties: (1) the NFLMC allegedly breached its fiduciary duty under ERISA by failing to monitor the actions of the members of the Retirement Board that it appointed (Count III); (2) a "2017 Amendment," to the extent it applies to the Plan, is allegedly invalid and cannot be applied retroactively against the Plaintiff (Count IV)[3]; and (3) a limitations provision in the Plan allegedly attempts to relieve the Plan's fiduciaries of any responsibility or liability in violation of §§ 410 and 404(a)(1)(A) & (B) of ERISA (Count V). Plaintiff's claims against the NFLMC fail at the threshold, however, because they are predicated on Plaintiff's unsupported and inflated view of the NFLMC's fiduciary duties. The NFLMC now moves to dismiss those counts as to the NFLMC.

STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must plead sufficient facts to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss under Rule 12(b)(6), all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in the plaintiff's favor. *Littlejohn v. N.Y.C.*, 795 F.3d 297, 306 (2d Cir. 2015). However, "a plaintiff's obligation to provide the grounds

[3] In his brief in opposition to the Retirement Board's motion to dismiss, Plaintiff appears to concede Count IV. (*See* ECF No. 29 at 3 n.2.)

of his entitlement to relief requires more than labels and conclusions . . . ." *Twombly*, 550 U.S. at 555 (internal citations omitted). Accordingly, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556).

ARGUMENT

To state a claim for fiduciary breach under ERISA, a plaintiff must allege facts that show the defendant was a fiduciary of the retirement plan and breached its fiduciary duty. 29 U.S.C. §§ 1105(a); 1109(a); *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 131 F. Supp. 3d 103, 121 (S.D.N.Y. 2015). Therefore, to survive a motion to dismiss, Plaintiff must allege facts demonstrating that the NFLMC is a fiduciary of the Plan for purposes of the asserted claims, and that the NFLMC breached its fiduciary duty. Plaintiff has done neither, and therefore his claims against the NFLMC should be dismissed as a matter of law.

I. Plaintiff Does Not and Cannot Demonstrate That the NFLMC Is a Fiduciary to the Plan Under ERISA.

Like all Taft-Hartley multi-employer pension plans, the Plan is subject to ERISA. 29 U.S.C. §§ 1001-1461; *Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co., Inc.*, 692 F.3d 127, 128 (2d Cir. 2012) ("ERISA is a comprehensive statutory scheme regulating employee retirement plans."). Under ERISA, both single-employer and multi-employer plans must have a fiduciary with authority to control and manage the operation and administration of the plan. 29 U.S.C. §

1102(a).[4] ERISA allows for both named and *de facto* fiduciaries. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 565 (S.D.N.Y. 2011). A named fiduciary is a fiduciary identified in the plan instruments that possesses the "authority to control and manage the operation and administration of the Plan." 29 U.S.C. § 1102(a). A *de facto* fiduciary is defined not by the text of the plan, but rather by the exercise of "discretionary authority or discretionary control" with respect to the disposition of plan assets, plan money or investments, or the administration of the plan. 29 U.S.C. § 1002(21)(A).

Plaintiff does not—and cannot—allege that the NFLMC is a named fiduciary under the Plan. The Plan expressly states that "[t]he Retirement Board will be the 'named fiduciary' of the Plan . . . ." (Plan, Art. 8.2.) Nor can the NFLMC be viewed as a *de facto* fiduciary under ERISA. The Complaint puts forth no allegation that the NFLMC exercised any discretionary authority or control over the Plan's assets, nor does it allege that the NFLMC had any discretionary responsibility in the management or administration of the Plan. Indeed, the Complaint barely mentions the NFLMC, and certainly does not allege that the NFLMC was involved in any way in managing or administering the Plan. Merely calling the NFLMC a "fiduciary" does not make it so. 29 U.S.C. § 1002(21)(A); *see also Sommers Drug Stores Co. Emp. Profit Sharing Tr. v.*

[4] In contrast to a single-employer plan, which is funded and administered by a sole employer, 29 U.S.C. § 1002(16)(B), multi-employer plans are maintained pursuant to collective bargaining agreements between employers and employee organizations, which require multiple employers—such as NFL clubs—to "pool contributions into a single fund that pays benefits to covered retirees who spent a certain amount of time working for one or more of the contributing employers." *Honerkamp*, 692 F.3d at 129; *see also* 29 U.S.C. § 1002(37)(A). Multi-employer plans offer advantages in certain situations that make single-employer plans unfeasible, for example in industries where employees transfer among employers. *See Honerkamp*, 692 F.3d at 129; *see also N.Y. Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236, 241 (S.D.N.Y. 2018). Multi-employer plans are overseen by a board of trustees with equal voting strength held by representatives of the union and the employers who contribute to the plan. *See, e.g.*, *Flynn v. Hach*, 138 F. Supp. 2d 334, 337 (E.D.N.Y. 2001).

Corrigan Enters., Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986) ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control."); *Trs. of Sheet Metal Works Nat'l Pension Fund v. Kakareko (In re Kakareko)*, 575 B.R. 12, 23 (Bankr. E.D.N.Y. 2017) ("The definition of 'fiduciary' under ERISA focuses on the exercise, as well as the possession, of authority or control.") (internal citations omitted).

In fact, imposing broad fiduciary duties on appointing entities in the multi-employer context runs counter to Supreme Court precedent, which prohibits an employer who appoints a representative to the board of trustees of a multi-employer pension plan from directing or supervising the decisions of a trustee it has appointed. *NLRB v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 330 (1981).[5] Not surprisingly, the Second Circuit has never held that employers who have the authority to appoint and remove trustees makes the employer itself a fiduciary, and courts in this District have specifically rejected Plaintiff's contention to the contrary. For instance, in *In re WorldCom, Inc.*, Judge Cote rejected the plaintiffs' assertion that "the right to appoint and to remove the individuals who will fill these positions [Plan Administrator and Investment Fiduciary] is a fiduciary function [conferring] the fiduciary duty to monitor the performance of an appointee." *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003). Judge Cote noted that the plaintiffs' argument "goes too far," because "[i]t would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *Id. See also In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA does not attach liability for investment decisions to

[5] Imposing a fiduciary obligation on contributing employers to multi-employer plans to direct the determinations of employer representatives on the board of trustees also would be contrary to the long-standing structure of multi-employer plans, which often consist of dozens of contributing employers. If simply having a contribution obligation to a multi-employer pension plan requires a contributing employer to supervise and direct the decisions of the employer representatives it appoints to the board of trustees, multi-employer plans would have numerous employers directing their actions, and the system would not work.

fiduciaries whose roles were limited to appointing, retaining and removing other fiduciaries."); *Hudson* R&R at 35 ("If every employer or union that appoints plan trustees were themselves deemed an ERISA fiduciary liable for every alleged act or omission of those trustees, the whole system of multi-employer pension plans would become grossly inefficient.").

Here, too, the NFLMC's authority to appoint and remove members from the Board does not—and legally cannot—confer the NFLMC with a fiduciary authority over the decisions made by the members that it appoints. *Hudson* R&R at 36 ("The mere fact that the [NFLMC] can appoint and remove three members of the Retirement Board does not suffice to make the [NFLMC] liable for the Retirement Board's substantive decisions."); *see also Bear Stearns*, 763 F. Supp. 2d at 566 (finding that where a party "has no authority to [act], it cannot be held liable for failing to take that action"). Accordingly, Plaintiff's claims against the NFLMC, each of which presupposes that the NFLMC is a fiduciary to the Plan, fail as a matter of law.

II. In Any Event, Plaintiff Cannot Demonstrate That the NFLMC Breached Any Purported Fiduciary Duties.

Regardless of whether Plaintiff can demonstrate that the NFLMC had a fiduciary duty with respect to appointing and replacing the employer representatives to the Retirement Board, Plaintiff's claims against the NFLMC should be dismissed because Plaintiff cannot demonstrate as a matter of law that the NFLMC breached any purported fiduciary duty. Where courts have found that the power to appoint and remove trustees of a multi-employer plan establishes *any* fiduciary responsibility, that fiduciary responsibility has been limited to the performance of actually appointing and removing trustees. *See, e.g., Hudson* R&R at 37 (explaining that the NFLMC's "obligations were limited to exercising its specified responsibilities under the Plan; namely, appointing or removing three members of the Retirement Board"); *Grossman v. Dirs. Guild of Am., Inc.*, No. EDCV 16-1840-GW(SPx), 2017 WL 5665025, at *8 (C.D. Cal. May 1,

2017) (noting that "the Ninth Circuit has extended fiduciary status to entities whose only control of the administration of the plan is through the power to appoint and remove plan trustees," but concluding that "[s]uch an entity owes a fiduciary obligation only in the performance of its appointment and removal role"); *Int'l Bhd. of Elec. Workers, Local 90 v. Nat'l Elec. Contractors Ass'n*, No. 3:06cv2 (SRU), 2008 WL 918481, at *7 (D. Conn. Mar. 31, 2008) (finding that employer association representing contributing employers was an ERISA fiduciary by virtue of its power to appoint and remove trustees, but noting that the association's "fiduciary obligations are, of course, limited to those aspects of the plan over which [it] exercises authority or control") (quoting *Sommers Drug Stores*, 793 F.2d at 1459-60); *see also Sommers Drug Stores*, 793 F.2d at 1459-60 ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. For example, if an employer and its board of directors have no power with respect to a plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions.") (internal citations omitted). Moreover, where a party has no authority or control to act, it cannot be held liable for failing to take that action. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d at 565 (S.D.N.Y. 2011).

Here, the complaint contains no allegation that the NFLMC failed to satisfy its limited obligations under the Plan. Indeed, just as in *Hudson,* the Complaint includes no allegation that the NFLMC's performance in appointing and removing employer representatives was not with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *see also Hudson* R&R at 37-38 ("It is undisputed that the [NFLMC] did, in fact, appoint three members to the Retirement

Board. . . . [Therefore,] to the extent that the [NFLMC] had fiduciary duties under the terms of the Plan, it *fulfilled* those duties.").

Nor can Plaintiff save its claims by casting the NFLMC's obligation to appoint three employer trustees to the Retirement Board into an impermissibly broad and novel interpretation of the "duty to monitor" appointed trustees. Plaintiff alleges that the NFLMC should have "monitored" the Retirement Board by requiring the Retirement Board to adopt revisions to and interpretations of the Plan more favorable to Plaintiff. (Am. Compl. ¶ 80.) But if the NFLMC had directed the Retirement Board to change its determinations, the NFLMC would have exceeded its limited authority to appoint and replace employer representatives to the Retirement Board, and would have run afoul of the Supreme Court's explicit prohibition against employers directing the decisions of their appointees to a multi-employer plan's board of trustees.[6] *See Amax Coal Co.*, 453 U.S. at 330.

Even assuming that Plaintiff is correct that appointing representatives to the Retirement Board imposes a "duty to monitor" those appointees, the Complaint contains no allegations that the NFLMC breached this duty. To the extent there is any duty to monitor multi-employer plan trustees, it is limited, at most requiring that "at reasonable intervals the performance of trustees and other fiduciaries should be reviewed . . . in such a manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." *Local 90*, 2008 WL 918481, at *7 (quoting *Liss v.*

[6] Plaintiff's arguments fail for the additional reason that the NFLMC only has the authority to appoint three employer trustees to the Retirement Board. Therefore, even if the NFLMC could direct the actions of its appointed trustees—which it cannot—the NFLMC would still be unable to direct the actions of the Retirement Board. (Plan, Art. 8.1, 8.2). For Plaintiff's claim to succeed, the NFLMC would be required to take actions for which it lacks the authority to take not only under the law, but also under the terms of the Plan.

Smith, 991 F. Supp. 278, 311 (S.D.N.Y. 1998)). An appointing fiduciary is "not obliged to examine every action taken by [his appointees] but [is] obliged to take prudent and reasonable action to determine whether the administrators were fulfilling their fiduciary obligations." *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d at 477 (internal citations omitted). The Complaint's allegations against the NFLMC related to its alleged failure to monitor the Retirement Board are threadbare at best. Indeed, the NFLMC is barely mentioned throughout the Complaint, and Plaintiff supports his allegations against the NFLMC with conclusory statements that the NFLMC "should have" known that the Retirement Board's administration of the Plan did not comply with ERISA. Plaintiff has pleaded no facts to permit the inference that the NFLMC failed to monitor its appointed employer representatives. *See Hudson* Order at 7 ("Plaintiff simply states that because breaches occurred—a predicate factual assumption that . . . is also not adequately pleaded—the [NFLMC] and the [NFLPA] must not have properly monitored the Retirement Board. That is not enough to state a claim.").

Furthermore, courts analyzing an appointing fiduciary's duty to monitor have refused to impose a broad fiduciary duty in this context. Courts have limited the duty to monitor to practical tasks related to appointing those trustees—such as monitoring appointees' attendance at meetings and confirming that appointees voted on matters. *See Hudson* R&R at 38 (finding that the plaintiff had not alleged that the NFLMC had "failed to monitor in a manner that falls within the limited scope of that duty" when plaintiff did not allege that the NFLMC failed to monitor whether its appointed members attended meetings, cast votes, or otherwise carried out their duties); *Local 90*, 2008 WL 918481, at *8 (finding that the appointing entity had breached its duty by failing to monitor and replace trustees who did not attend meetings or cast votes on plan issues). This limit is logical and appropriate, as imposing broad fiduciary duties on an appointing fiduciary

undermines the rationale of appointing a board of trustees in the first place. *See, e.g., Johnson v. Evangelical Lutheran Church in Am.*, No. 11-23 (MJD/LIB), 2011 WL 2970962, at *5 (D. Minn. July 22, 2011) ("The duty to monitor is limited and does not include a duty 'to review all business decisions of Plan administrators' because 'that standard would defeat the purpose of having trustees appointed to run a benefits plan in the first place.'" (quoting *Howell v. Motorola*, 633 F.3d 552, 573 (7th Cir. 2011)); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009) (noting that the duty to monitor "has clear limits," and rejecting plaintiffs argument that it entails monitoring the prudence of a specific investment, as such a broad duty to monitor would undermine the rational of creating an investment committee).

The allegations in the Complaint do not show that the NFLMC failed to monitor its appointees in the limited way recognized under the law. *See Hudson* R&R at 38 ("[A]ppointing parties are not fiduciaries with respect to the decisions made by the trustees.") By asking this Court to hold the NFLMC accountable for the Retirement Board's interpretation and administration of the Plan, and requiring the NFLMC to direct the Retirement Board to change its determinations, Plaintiff impermissibly attempts to expand any purported duty to monitor. Therefore, claims against the NFLMC must be dismissed.[7]

[7] Plaintiff asserts that the NFLMC is liable for the Retirement Board's alleged breach of fiduciary duty because of the NFLMC's duty to monitor its appointees. But in order for Plaintiff to have such a claim against the NFLMC—if such a claim even exists—he must first adequately plead a breach of fiduciary duty claim against the Retirement Board. Courts have recognized that, "[a] claim for breach of the duty to monitor requires an antecedent breach to be viable," and "[w]ith no antecedent breach by the monitored parties in this case, …[the] duty to monitor claim fails." *Bear Stearns*, 763 F. Supp. 2d at 580. As the Retirement Board explains in its motion to dismiss (ECF No. 16-2), Plaintiff's claims lack merit for multiple reasons, not least of which is that Plaintiff does not even suggest that his request for reclassification of benefits presented "changed circumstances" under *any* definition of the term that would warrant reconsideration of his benefits claim under the Plan. Accordingly, because Plaintiff has failed to state a claim against the Retirement Board and dismisses the Complaint as to the Retirement Board, the Court must also dismiss the Plaintiff's claims against the NFLMC.

III. Counts IV and V Fail to State Any Claim Against the NFLMC

Count IV, which Plaintiff appears to have jettisoned (*see* ECF No. 29 at 3 n.2), seeks to require enforcement of the terms of the Plan in existence prior to 2017, and prior to a 2017 Amendment, which Plaintiff fails to describe with any sort of particularity in his complaint. This claim also must be dismissed against the NFLMC. As an initial matter, Plaintiff fails to allege that the 2017 Amendment, which is an amendment to an entirely different employee benefit plan, is even applicable to the Plan. But even if the 2017 Amendment did apply to the Plan (which it does not), the NFLMC does not have the authority under the Plan to interpret, apply, or enforce the terms of the 2017 Amendment, or any other terms of the Plan. Under the Plan, only the Disability Initial Claims Committee and the Retirement Board have that authority. (Plan, Art. 8.2, 8.5).

Plaintiff's Complaint lacks any allegation that the NFLMC has the authority to enforce the terms of the Plan. Rather, Plaintiff's Complaint alleges only that the NFLMC has the authority to appoint and replace the three employer trustees on the Retirement Board, and that the NFLMC, jointly with the NFLPA, has the authority to amend the Plan. (Am. Compl., ¶ 19). As explained above, however, neither the authority to appoint and replace trustees, nor the joint authority to amend the Plan, provides the NFLMC the authority to interpret and apply, or to not apply, the terms of the Plan to a participant's claim. Accordingly, Plaintiff's claim seeking to compel the NFLMC to use a power that it is not alleged to possess is both implausible and factually insufficient, and should therefore be dismissed. *See Iqbal*, 556 U.S. at 663.

Additionally, because Plaintiff has failed to state a claim against the NFLMC for breach of fiduciary duty, Count V also must be dismissed as to the NFLMC. Under Count V, Plaintiff attempts to void a provision of the Plan "[t]o the extent that [it] attempts to relieve these Defendants of their responsibility or liability to discharge their fiduciary duties under ERISA." (Am. Compl.

¶ 96.) Specifically, Plaintiff seeks to have the "constructive knowledge" provision in the Plan's breach of fiduciary duty statute of limitation language declared null and void, either because it violates ERISA or because the Retirement Board failed to adequately explain it in the Summary Plan Description that Plaintiff received. (Am. Compl. ¶¶ 95-98.) However, because Plaintiff has failed to allege sufficient facts to demonstrate that the NFLMC even breached any fiduciary duty, Count V is irrelevant as to Plaintiff's claim against the NFLMC. Accordingly, Count V against the NFLMC should be dismissed.[8]

CONCLUSION

For the reasons stated above, the NFLMC respectfully requests that this Court dismiss Plaintiff's Counts III, IV, and V against the NFLMC for failure to state a claim upon which relief may be granted, and dismiss the NFLMC from this action.

[8] Plaintiff's Complaint should be dismissed for the separate and independent reason that the statute of limitations has run, as set forth more fully in the brief filed by the Retirement Board filed on September 9, 2019. (*See* ECF No. 16-2.)

Dated: October 3, 2019

Respectfully submitted,

/s/ Stacey R. Eisenstein

M. Christine Slavik
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036
Tel: (212) 872-1000
Fax: (212) 872-1002
Email: cslavik@akingump.com

Stacey R. Eisenstein (*pro hac vice*)
Eric D. Field (*pro hac vice*)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
Tel: (202) 887-4000
Fax: (202) 887-4288
Email: seisenstein@akingump.com
Email: efield@akingump.com

Counsel for Defendant National Football League Management Council